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No. _____

In The

Supreme Court of the United States

October Term, 1994

MARINE TOWING, INC., ET AL.,

Petitioners,

versus

SPHERE DRAKE INSURANCE plc,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, an international Treaty to which the United States is a signatory, mandate arbitration when there is no express or consensual agreement to arbitrate between the parties.

2. Does the Fifth Circuit's interpretation of the Convention language defining an "agreement in writing" to arbitrate violate the clear language and intent of the Convention.

3. Does the Fifth Circuit's interpretation of the Convention language defining an "agreement in writing" to arbitrate cause a conflict with another American Treaty, the *Inter-American Convention on International Commercial Arbitration*, so as to create confusion and uncertainty for international business transactions.

4. Does the Fifth Circuit's interpretation of the Convention language defining an "agreement in writing" to arbitrate violate the strong public policy of protecting and preserving a United States Citizen's right to litigate in United States Courts.

PARTIES

Petitioner, Marine Towing, Inc., performs payroll and accounting functions on behalf of four vessel towing companies based in Westwego, LA. St. Jude Marine Service, Inc., Moose Towing, Inc. Riverside Maritime Enterprise, Inc. and Brass Marine, Inc. are separately formed companies that own and operate towing vessels, including the M/V St. Jude which sank on March 14, 1992 with four men lost. Charles Arnold is the owner of Marine Towing, Inc. All of the above Petitioners (hereinafter collectively referred to as "Marine Towing") were insureds under the Sphere Drake insurance policy. Respondent, Sphere Drake Insurance plc, is an English Insurance Company located in London, England.

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PETITION FOR WRIT OF CERTIORARI

Marine Towing, et al., Petitioners, hereby petition the Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on March 23, 1994.

OPINIONS, JUDGMENTS, AND ORDERS BELOW

The March 23, 1994 opinion of the Fifth Circuit is reported at 16 F.3d 666 (5th Cir. 1994) and appears and is reprinted herein, Appendix A, 1a, *infra*. The Petition for Rehearing and for Rehearing En Banc was denied on April 22, 1994 and appears and is reprinted herein,

Appendix B, 10a, *infra*. The District Court's Judgment granting Sphere Drake's Motion to Stay and Motion to Compel Arbitration was rendered on February 26, 1993 and is reprinted herein, Appendix C, 12a, *infra*. The District Court's Minute Entry and Reasons denying Marine Towing's Motion to Dismiss Sphere Drake's Petition to Stay and Compel Arbitration, dated December 28, 1992, which contains the District Court's reasoning pertaining to the arbitration issue, appears and is reprinted herein, Appendix D, 15a, *infra*.

JURISDICTIONAL GROUNDS

The Judgment of the Fifth Circuit Court of Appeals was entered on March 23, 1994. The Fifth Circuit denied Rehearing and Rehearing En Banc on April 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

UNITED STATES TREATY INVOLVED

The *Convention of the Recognition and Enforcement of Foreign Arbitral Awards*, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (1970), reprinted following 9 U.S.C.A. § 201.

Article II, § 1:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them . . .

Article II, § 2:

> The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

STATEMENT OF THE CASE

Marine Towing, a four vessel towing operator, had an insurance policy with Sphere Drake. Sphere Drake arbitrarily denied insurance coverage to Marine Towing after one of its vessels capsized on March 14, 1992 and four (4) crew members aboard drowned.

Sphere Drake, an English Insurance Company, contended that a warranty provision was violated. Marine Towing denies that any warranty provision was violated. This constitutes the underlying dispute, and no discovery has been conducted on this issue. When Sphere Drake denied coverage to Marine Towing, Marine Towing filed a Declaratory Action in a Louisiana State Court. Sphere Drake removed the case, but it was remanded by the United States District Court to the Louisiana State Court. Prior to remand, Sphere Drake filed a Petition to Stay and/or to Compel Arbitration against Marine Towing. The basis of the Motion to Stay and to Compel Arbitration was the Treaty entitled the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (1970), reprinted following 9 U.S.C.A. § 201 (hereinafter referred to as the "**Convention**"), a Treaty to which the United States is a signatory. The contention of Sphere Drake was that the

insurance contract, in and of itself, which contains an arbitration agreement, constitutes an "agreement in writing" under the **Convention**.

In regard to the placement of the insurance policy, Marine Towing met with Schade, a New Orleans insurance broker in September of 1991 and ordered replacement insurance for its four vessel fleet. Schade, acting for Marine Towing, contacted George Feagin of American E & S Insurance of Texas, Inc., (hereinafter referred to as "American E & S"), to place the policy. All negotiations for the coverage were conducted between Schade and American E & S, who was acting on behalf of the London insurer, Sphere Drake. At no time did Schade ever have any contact with Robert Barrow, Ltd. (hereinafter referred to as "Barrow"), who apparently dealt with American E & S and Sphere Drake to issue the policy. Negotiations were conducted by Schade, acting on behalf of Marine Towing, and American E & S, acting on behalf of the insurer, Sphere Drake.

In the negotiations and exchange of communications, oral and written, there was never any mention of any agreement that any coverage dispute would be arbitrated in London. The policy was issued to Marine Towing with effective dates of October 7, 1991 through October 7, 1992. The policy stated on its front cover page that American E & S was the "insurer's representative". The Sphere Drake Policy was issued and validated by Larry Mennes, employed by American E & S, who also signed the endorsements on the policy as the "authorized signature" of Sphere Drake. Several months after the policy went into effect, the policy was delivered by American E & S to Schade. At the time of the sinking of the ST. JUDE, March

14, 1992, and the death of four persons aboard the vessel, the policy had not been delivered from Schade to Marine Towing. Therefore, at the time of the loss, Marine Towing had no knowledge of, nor had it ever agreed to, a crew warranty endorsement upon which Sphere Drake is allegedly relying upon to deny coverage nor the arbitration provision contained in the Sphere Drake policy.

The District Court did not issue written reasons in support of its judgment granting Sphere Drake's Stay and Motion to Compel Arbitration, but it apparently based its decision on the reasons cited for the denial of Marine Towing's Motion to Dismiss. In ordering arbitration in London, the Court apparently concluded that the Sphere Drake policy itself qualified as an "agreement in writing" under the **Convention**.

Marine Towing appealed the Arbitration and Stay Order issued by the District Judge. The Fifth Circuit rendered an opinion affirming the District Court. The Fifth Circuit ruled that the inclusion of an arbitral clause in an insurance policy, in and of itself, constitutes an "agreement in writing" under the **Convention**.

The Fifth Circuit construed the language in the **Convention** defining an "agreement in writing" in a grammatically unique manner. The **Convention**, Article II, § 2 defines "agreement in writing" as follows:

> The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

The Court ruled that the requirement of a signing by the parties or an agreement to arbitrate contained in an

exchange of letters or telegram only applied to "an arbitration agreement" and not to an "arbitral clause".

The Petition for Rehearing and for Rehearing En Banc was denied on April 22, 1994 by the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

The **Convention** is a Treaty between the United States and fifty-seven other countries. It is an important instrument of international commerce. This is especially true as more and more United States commerce becomes involved in the global economy. The **Convention** provides for international arbitration but has strict requirements. The strict requirements make sure the parties have actually negotiated for and agreed to international arbitration. An agreement for international arbitration is not presumed and can not be inserted unilaterally by only one of the contracting parties.

The requirements of the **Convention** in regard to an "agreement in writing" to arbitrate are clear. An "agreement in writing" can be an arbitral clause in a contract or an arbitration agreement but there is an absolute requirement that these documents be signed by the parties or contained in an exchange of letters or telegrams. The reason for this is quite clear. Before a citizen of a country to the Treaty gives up his rights to go into a court of law and have his rights adjudged by recognized judges and jurisprudence, he must do it knowingly and affirmatively. This is because a fundamental right is being taken away from a citizen of a country, namely, the right to litigate in the courts of his own country.

The Fifth Circuit Opinion ignores clear wording of the **Convention** and holds that the mere inclusion of an arbitration clause in an agreement, in this case an insurance policy, is the only thing necessary to have a citizen's access to the judicial system forfeited. This formalistic, mechanical approach violates public policy and established jurisprudence. The Fifth Circuit Opinion is contrary to a prior district court opinion from the Southern District of New York. *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F.Supp 879 (S.D. N.Y. 1991). Although not a Court of Appeal, the Southern District of New York is known for its expertise in international business and commercial litigation. The direct conflict between the District Court in the Southern District of New York and the Fifth Circuit creates an uncertainty in the international business community on the important issue of when parties have agreed to international arbitration.

In addition to the above, the decision of the Fifth Circuit conflicts with another United States treaty on international arbitration. *Inter-American Convention on International Commercial Arbitration*, reprinted following 9 U.S.C.A. § 301 (hereinafter referred to as the "**Inter-American Convention**"). In the **Inter-American Convention**, the agreement to arbitrate must be signed by the parties or contained in the form of an exchange of letters, telegrams or telex communications. If the Fifth Circuit's opinion is allowed to stand, then the standard for the **Convention** for an agreement to arbitrate will be at odds with the **Inter-American Convention**. The resulting uncertainty will be interjected into all international agreements where arbitration has not been expressly agreed. This is the opposite result which any treaty involving

arbitration should achieve. Since the scope of international insurance policies and business agreements between the United States and fifty-seven countries is vast, this **Convention** treaty must be correctly and uniformly interpreted so that international commerce can be furthered, not hindered.

1. Before a United States Citizen is denied under the **Convention** the right to have a cause of action heard in a United States Court, there has to be a consensual and express agreement to arbitrate.

In the present case, neither Marine Towing nor its agent, Schade, ever discussed the issue of arbitration with Sphere Drake and never consensually agreed to arbitration. A pre-printed arbitration clause was in an insurance contract received after the loss and is the alleged basis of arbitration in this case. This is insufficient to abrogate a private right to seek judicial redress.

Under the **Convention**, the requirement of a signing or an exchange of communications highlights the importance of consent. With all respect, Marine Towing suggests that the Fifth Circuit overlooked the issue of consent. No where does the Fifth Circuit address the issue of consent to arbitrate as being part of the contract formed by the parties.

Arbitration is the process by which individuals and corporations can opt out of a judicial system. It is not presumed and must be consensual.

Courts have recognized the extraordinary character of an agreement to arbitrate. In *Par-Knit Mills v. Stockbridge Fabrics Co.*, 636 F.2d 52 (3rd Cir. 1980), the Court made the following comment concerning arbitration:

> *Before a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect.* If there is any doubt as to whether such an agreement exists, the matter, upon a proper and timely demand, should be submitted to a jury. Only when there is no genuine issue of material fact concerning the formation of the agreement should the Court decide as a matter of law that the parties did or did not enter into such an agreement. The District Court, when considering a Motion to Compel arbitration which is opposed on the ground that no agreement to arbitrate has been made between the parties, should give the opposing party the benefit of all reasonable doubts and inferences that may arise. *Id.* at 54. [emphasis added]

The above principle was followed by the Eighth Circuit in *Case Intern. Co. v. T.L. James and Co., Inc.*, 907 F.2d 65 (8th Cir. 1990), when the court stated:

> This dispute is subject to the enforcement provisions of the Federal Arbitration Act (FAA) because it involves a transaction in commerce. 9 U.S.C. §§ 2, 4 (1988) . . . As the District Court noted, although the FAA favors expanded arbitration coverage where there is a question regarding scope, arbitration will not be imposed upon a party unless a party has agreed to this settlement procedure. *Id.* at 67.

The Court went on to state:

> We are not inclined to find that a party has waived its right to ordinary judicial process *without an express and specific agreement. Id.* at 67. [emphasis added]

The above cases were decided under the Federal Arbitration Act, 9 U.S.C. § 1, et al. The Arbitration Act is more liberal than the **Convention**. However, even the Federal Arbitration Act, under 9 U.S.C. § 4, provides for a trial when the making of an arbitration agreement itself is at issue. The above cases show that the question of whether an agreement to arbitrate exists is to be viewed strictly.

Under the facts before the Court, there is certainly a question of fact as to the consent to arbitrate in London. The subject of arbitration never came up in any insurance negotiations, and no arbitration agreement was ever confected by consent. Affidavits were introduced asserting this fact by Marine Towing. The requirements of consent should not be overlooked by a court or made the subject of summary procedures.

The insurance policy, which was pre-printed, was sent to Schade, the Agent for Marine Towing, but not presented to Marine Towing prior to the loss. Neither Schade nor Marine Towing ever agreed to an arbitration provision. An arbitration provision is not a standard insurance language provision and, historically, has not been found in P & I policies (protection and indemnity). The Fifth Circuit held that the mere inclusion of an arbitration clause in a pre-printed insurance policy which is sent to an insured constitutes an express and unequivocal

agreement to arbitrate. This is incorrect since absent a meeting of the minds, there is no consent.

In summary, the inclusion of an arbitration agreement in a pre-printed insurance policy delivered after a loss does not constitute an agreement to arbitrate under the **Convention**. There has to be an express and clear consent for a party to arbitrate and to waive the right to be heard in a United States Court. Since there was no agreement to arbitrate in this matter, no arbitration should be ordered.

2. The Fifth Circuit's interpretation of the Convention language defining an "agreement in writing" to arbitrate violates the clear language and intent of the Convention, creates a conflict with another United States Treaty, *i.e., Inter-American Convention on International Commercial Arbitration,* and violates the strong public policy of protecting and preserving a United States Citizen's rights to litigate in a United States Court.

The Fifth Circuit's interpretation of an "agreement in writing" to arbitrate under the **Convention** is grammatically incorrect and violates the intent of the **Convention**. The **Convention** requires consent as reflected by the grammar of the sentence construction contained in the definition section of the **Convention.** The requirement that an agreement to arbitrate must be "signed by the parties or contained in an exchange of letters or telegrams" applies to both "an arbitral clause in a contract" and "an arbitration agreement". Consent to "an arbitral clause in a contract" is required. Therefore, the Fifth

Circuit opinion violates the clear wording of the United States Treaty involved.

In construing a treaty, as in construing a statute, the Court first looks to its terms to determine its meaning. *U.S. v. Alvarez-Machain*, 112 S.Ct. 2188, 2193, 119 L.Ed.2d 441 (1992). The Treaty language controls "unless 'application of the words of the Treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories' ", *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 L.Ed.2d 765 (1982) quoting *Maximov v. United States*, 373 U.S. 49, 54 83 S.Ct. 1054, 1057, 10 L.Ed.2d 184 (1963). Only if there are difficult or ambiguous passages in the Treaty will general rules of construction apply. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 111 S.Ct. 1489, 1493, 113 L.Ed.2d 569 (1991). In addition, treaties are construed "more liberally than private agreements, and to ascertain their meaning the Court may look beyond their written words to the history of the Treaty, the negotiations, and the practical construction adopted by the parties". *Id.* at 1493.

An examination of the language of the **Convention** proves the fundamental requirement of consent is required for an "arbitral clause in a contract". Pertinent language in the **Convention** is found in Article II, § 1:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them . . . .

The term "agreement in writing" is specifically defined under Article II, § 2 of the **Convention** as follows:

> The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

In regard to the grammatical construction of the definition section, it is important to examine that portion of the definition section which appears before the comma. This would be the following:

> The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement,

Referring to *Warriner's English Grammar and Composition*, (Fourth Course), John E. Warriner, Harcourt Brace Jovanovich, Publishers, 1986, it clearly states that the use of the term "or" is a "Coordinating Conjunction". It defines "Coordinating Conjunctions" as follows:

> Coordinating conjunctions.
>
> Conjunctions that join equal parts of a sentence are called coordinating conjunctions. They are *and, but, or, nor, for, so,* and *yet.*
>
> *Id.* at p. 26.

Since a "Coordinating Conjunction" joins equal parts of a sentence then, therefore, the phrase "arbitral clause in a contract" and "an arbitration agreement" are equal parts of that sentence. Therefore, the signing requirement, which is contained after the comma of the definition section, *i.e.*, "signed by the parties or contained in an exchange of letters or telegrams", applies equally to an

"arbitral clause in a contract" or "an arbitration agreement". For the Fifth Circuit opinion to state that this signing requirement only refers to "an arbitration agreement" and not to "an arbitral clause in a contract" is not grammatically correct.

A comma is all important in the grammatical construction of Article II, § 2 of the **Convention**.

If the intent of the drafters of the **Convention** was for the signing requirement to apply to only "an arbitration agreement", they easily could have made it clear by inserting a comma after "in a contract" and before "or an arbitration agreement". The definition section would have read:

> The term "agreement in writing" shall include an arbitral clause in a contract, or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.

Drafting the provision this way would have left no doubt that the signing and hence "consensual" requirement only referred to "an arbitration agreement". But the drafters did not place the comma as suggested in the above position but put the comma in after the language referring to the "arbitral clause in a contract" or "an arbitration agreement". Therefore, the signing requirement applies to both "an arbitral clause in a contract" and "an arbitration agreement". "Or" is used conjunctively.

Support of this position is found in *Restatement (3rd) of the Foreign Relations Law of the United States*, § 487, Comment d at 631. It states in pertinent part:

> . . . The United States Arbitration Act, 9 U.S.C. § 2, and the arbitration laws of most States of

> the United States, require that an agreement to arbitrate be in writing, but the agreement need not be signed by the parties. The Convention requires the agreement to be in writing signed by the parties, but an exchange of letters or telegrams is commonly held to satisfy this requirement, without need to prove signatures.
> . . .

Therefore, the *Restatement (3rd)* holds that under the **Convention** that both "an arbitral clause in a contract" and "an arbitration agreement" have to be signed by the parties or contained in an exchange of letters or telegrams. The arbitral clause must be consensual. It cannot be inserted unilaterally in a battle of forms.

As the Fifth Circuit recognized in its opinion, the only previously decided case involving an interpretation of the signature requirement under the **Convention** is *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F.Supp. 879 (S.D. N.Y. 1991). *Sen Mar*, like the *Restatement*, states that an "agreement in writing" to arbitrate, under the **Convention**, requires that the agreement be signed by the parties personally or that the arbitration be agreed to by an exchange of letters of telegrams. Sen Mar, like Sphere Drake in this matter, argued that a mere writing was enough under the **Convention** to find an arbitration agreement. The court rejected this argument and stated that the consensual signed or exchange requirement was more stringent. The court stated the following:

> Sen Mar does not, nor can it, allege that the arbitration clause contained in its telex has been signed by the parties or contained in an exchange of letters. Instead, Sen Mar asserts that the provision is valid merely because it is in

> writing. In making such an argument, Sen Mar apparently relies on cases that have interpreted the United States Arbitration Act ("the Act") to permit enforcement of an arbitration clause if it is contained in a signed or unsigned writing (citation omitted).
>
> These cases are not instructive, however, because while the act requires a written arbitration agreement it does not define a writing . . . (T)he Convention actually defines what will satisfy its writing requirement. An arbitration clause is enforceable only if it is found in a signed writing or an exchange of letters. Because the Convention controls in case of any conflict between the Convention and the Act, this Court will enforce the arbitration clause only if it satisfies the Convention's more stringent requirement. (citation omitted) *Id.* at 882.

In *Sen Mar,* because there was no writing signed by the parties or found in an exchange of letters, the court refused to order arbitration under the **Convention**. The court went on to state that Sen Mar's argument was "without merit on its face because the arbitration term appears only in Sen Mar's July 17th telex." *Id.* at 882. *Sen Mar* stands for the proposition that the **Convention** has a more stringent requirement for finding an "agreement in writing" than the United States Arbitration Act. *Sen Mar* holds that the **Convention** requires that the "agreement in writing" to arbitrate must be signed by the parties or contained in an exchange of letters or telegrams.

It is notable that a Federal Judge in the Southern District of New York, in *Sen Mar, supra,* interpreting the **Convention** phrase, "agreement in writing", clearly found that the signing or exchange requirement, *i.e.,* a

signed writing or an exchange of letters, applied to both "an arbitral clause in a contract" and "an arbitration agreement". Yet the Fifth Circuit Court in interpreting the same phrase, finds that the consensual requirement reflected by a writing or exchange of letters only applies to "an arbitration agreement" and not "an arbitral clause in a contract".

In further support, Petitioners direct the Court's attention to a similar treaty on international arbitration. The *Inter-American Convention on International Commercial Arbitration*, reprinted following 9 U.S.C. § 301, (hereinafter referred to as "**Inter-American Convention**"), states in Article 1:

> An agreement in which parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. *The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letter, telegrams, or telex communications.* [emphasis added]

9 U.S.C. § 302 specifically incorporates by reference legal statutes found in 9 U.S.C. §§ 202, 203, 204, 205 and 207 which pertain to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, (the **Convention** at issue in this case). The **Inter-American Convention** shows that the international community requires that the parties sign the arbitration document or consent to arbitrate through an exchange of letters, telegrams or telexes. The same standard should apply to the **Convention.** This

uniformity would provide stability and certainty to business entities conducting international business transactions. To do otherwise, would provoke confusion.

Although Marine Towing feels that it is clear that the consensual requirement applies to both "an arbitral clause in a contract" and "an arbitration agreement", an alternative argument is that the provision is ambiguous. If ambiguity exists, then the policy requiring consent should be enforced. This Court should not endorse the formalistic, restrictive view that the existence of an international arbitration clause, whether consented to or not, will be given a conclusory and final effect. The Fifth Circuit's opinion advances a mechanistic approach requiring only that an arbitral clause be found in an insurance agreement, regardless of whether the parties agreed or consented to arbitrate.

Both public policy and common sense support a broad interpretation of the signing or exchange requirement before mandating international arbitration. The agreement to submit to international arbitration, where one has to travel to a foreign land and surrender his right to litigate in a U.S. Court, should not be found unless it is a consensual and express act. The fundamental right of judicial process should not be taken away by an act of omission. An agreement to arbitrate should be a positive consensual act, not a failure to act.

Proper interpretation of the **Convention** is especially important with the opening of trade and the formation of international trading units among countries. If parties to an international contract both agree to arbitrate, then the agreed arbitration should occur. Arbitration should be a

voluntary and consensual act on behalf of each participant to the contract or agreement. However, sanctioning and approving the insertion of arbitration clauses in documents, especially insurance contracts, which are not signed or agreed to by parties, is compromising an American Citizen's rights and generally undermining the consensual nature required for international arbitration agreements.

CONCLUSION

In conclusion, the interpretation of the "agreement in writing" requirement under the **Convention** should be consistent with other international conventions for arbitration. An agreement to arbitrate internationally should be explicit and consensual. This interpretation is given effect by making the signing requirement apply to both "an arbitral clause in a contract" and "an arbitration agreement".

This interpretation is supported by (a) the clear language of the **Convention;** (b) the *Restatement (3rd) of the Foreign Relations Law of the United States;* (c) the **Inter-American Convention;** (d) Sen Mar, *supra,* and (e) grammatical construction.

For the various reasons set forth above, this Petition for Certiorari should be granted and the erroneous

interpretation by the Fifth Circuit of the **Convention**, a United States Treaty, be corrected.

Respectfully submitted,

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APPENDIX

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MARINE TOWING, INC., ET AL.,

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APPENDIX A

SPHERE DRAKE INSURANCE
PLC, Plaintiff-Appellee,

v.

MARINE TOWING, INC., et al.,
Defendants-Appellants.

No. 93-3200.

United States Court of Appeals,
Fifth Circuit.

March 23, 1994.

Rehearing and Suggestion for Rehearing
En Banc Denied April 22, 1994.

Foreign insurer brought action to stay litigation and compel arbitration of disputed claim under Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The United States District Court for the Eastern District of Louisiana, Frederick J.R. Heebe, J., ordered arbitration and stayed all litigation between parties, and insured appealed. The Court of Appeals, Duhé, Circuit Judge, held that: (1) order compelling arbitration of disputed coverage was final; (2) action to compel arbitration was not impermissible collateral attack on earlier remand order in action for declaration of rights under policy and coverage; and (3) parties had "agreement in writing" within meaning of Convention.

Affirmed.

Scott Wheaton, Jr., Nathan P. Horner, Lugenbuhl, Burke, Wheaton, Peck & Rankin, New Orleans, LA, for defendants-appellants.

Robert Murphy, Peter Brooks Sloss, Murphy, Williams, Rogers and Sloss, New Orleans, LA, for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and STAGG,[1] District Judge.

DUHÉ, Circuit Judge:

Sphere Drake Insurance PLC sued Marine Towing, Inc. to stay litigation and compel arbitration of certain claims under a protection and indemnity policy. Defendant-Appellant Marine Towing, Inc. moved to dismiss for lack of jurisdiction. The district court denied Marine Towing's motion and ordered arbitration. Marine Towing appeals. Sphere Drake challenges our appellate jurisdiction, arguing that the district court order is not final. We find both appellate and district court jurisdiction and affirm.

I. Facts

Marine Towing contacted Schade & Co. to acquire protection and indemnity insurance for its vessels. Schade eventually secured a policy from Sphere Drake, a London marine insurer. Before Schade delivered the policy to Marine Towing, but during the policy period, and insured vessel sank. Upon receiving the policy, Marine

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[1] District Judge of the Western District of Louisiana, sitting by designation.

Towing discovered a provision requiring arbitration of coverage disputes in London.

Marine Towing nevertheless sued Sphere Drake and Schade in state court for a declaration of rights under the policy and coverage. Sphere Drake removed the case to federal court and moved to compel arbitration and stay the litigation pending arbitration. Marine Towing moved to remand, and the district court eventually remanded the case because Sphere Drake had not joined all defendants in the notice of removal. After remanding, the court dismissed the motions regarding arbitration as moot.

Before the remand of the removed case, Sphere Drake filed this case, a separate action, to stay litigation and to compel arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted in* 9 U.S.C.A. § 201 note (West Supp.1993) [hereinafter "the Convention"]. Marine Towing moved to dismiss this case, arguing that the court lacked jurisdiction both because of the remand of the removed case and because Marine Towing never agreed to arbitrate under the Convention. The court denied Marine Towing's motion, ordered arbitration, and stayed all litigation between the parties. From these orders, Marine Towing appeals.

II. Appellate Jurisdiction

Sphere Drake challenges our appellate jurisdiction, arguing that the arbitration order is interlocutory rather than final. The Federal Arbitration Act prohibits appeals from interlocutory orders compelling arbitration, but permits appeals from final orders compelling arbitration.

9 U.S.C.A. § 16(a)(3) & (b)(3) (West Supp.1993); *see also McDermott Int'l, Inc. v. Underwriters at Lloyds*, 981 F.2d 744, 746 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2442, 124 L.Ed.2d 660 (1993).

We consider an order final if it " 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *McDermott*, 981 F.2d at 747 (quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633 89 L.Ed. 911 (1945)).

> In determining whether an order affecting arbitration is final or interlocutory, most courts distinguish between arbitration actions that are "independent" and those that are "embedded" among other claims. Generally, if the only issue before the court is the dispute's arbitrability, the action is considered independent and a court's decision on that issue constitutes a final decision.

Id.

The only issue before the district court was the forum for determination of the coverage dispute. Unlike *Filanto, S.P.A. v. Chilewich International Corp.* 984 F.2d 58 (2d Cir.1993), and *Turboff v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 867 F.2d 1518 (5th Cir.1989), the decision to compel arbitration did not arise from a motion in an ordinary district court action wherein other claims were stayed pending arbitration. The civil action was an independent proceeding brought solely to test arbitrability and stay the various law suits. The arbitration order amounts to a final disposition in this context and ends the litigation.

In attempting to characterize this case as "embedded" rather than "independent," Sphere Drake considers the remanded action and three other federal actions that were stayed[2] arising from the sinking of the vessel. The federal actions were consolidated with this action "for discovery purposes only." We hold that this limited consolidation of the federal cases does not merge the cases into a single judicial unit so that they are considered "embedded." *See West of England Ship Owners Mut. Ins. Ass'n v. American Marine Corp.*, 981 F.2d 749, 751 (5th Cir.1993) (holding that, if consolidation of an independent proceeding to compel arbitration with one or more actions renders the cases a "single judicial unit," orders compelling arbitration and staying litigation are interlocutory, not final); *cf. McDermott*, 981 F.2d at 747-48 (considering cases a single judicial unit if they are consolidated "for disposition" or "for all purposes" rather than "for limited purposes"). Additionally, this federal case cannot be "embedded" in the sate court proceedings. The order in this case is final because "there is nothing left to be done *in the district court.*" 134 Cong. Rec. S16,284, S16,309 (daily ed. Oct. 14, 1988) (emphasis added) (section-by-section analysis of the Judicial Improvements and Access to Justice Act, which added 9 U.S.C. § 16 to the Federal Arbitration Act).

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[2] The order compelling arbitration stayed all federal and state court litigation between the Marine Towing and Sphere Drake pending arbitration (reserving Marine Towing's right to proceed against other defendants).

III. District Court Jurisdiction

Marine Towing challenged the district court's jurisdiction, arguing both the res judicata effect of the remand and a lack of jurisdiction under the Convention.

A. Effect of the remand on jurisdiction.

Regarding the remand, Marine Towing notes that while the removed case was pending in federal court, Sphere Drake filed a motion to compel arbitration and stay litigation – the identical relief it sought in this case. Because the same arguments were before the remanding court, Marine Towing argues that the remand should be res judicata as to the forum for resolving the issues.

The prohibition of jurisdiction over claims previously remanded in an earlier action is based upon the proscription against review of remand orders in 28 U.S.C.A. § 1447(d) (West 1973) (providing that a remand order "is not reviewable on appeal or otherwise"). *See New Orleans Pub. Serv., Inc. v. Majoue*, 802 F.2d 166, 167-68 (5th Cir.1986) (finding no jurisdiction over federal action that was "nothing more than an artful, if not subtle, attempt to circumvent . . . § 1447(d)"). A federal court does not have jurisdiction over a case filed for the purpose of collaterally attacking the remand of another action. *Browning v. Navarro*, 743 F.2d 1069, 1077-78 (5th Cir.1984) (rejecting review of bankruptcy remand via ancillary proceedings).

The question whether this suit constitutes an impermissible collateral attack on the earlier remand order is determined by considering whether the remanding court

decided the arbitrability question before remanding. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 396-97 (5th Cir. Unit B Feb. 1981). If the first district court "had adjudicated the merits of [Sphere Drake's] motion to compel arbitration . . . in its remand order, it is clear that [Sphere Drake] could not attack that order collaterally by alleging an independent action involving the same parties and claims." *Id.* at 396. If the remanding court did not consider the propriety of arbitration, however, the second suit is not an impermissible collateral attack on the remand order. *See id.* at 396-97.

The supplemental record, comprised of the removed and remanded case, refutes any suggestion that the district court adjudicated Sphere Drake's motion to compel arbitration in connection with the remand. The district court remanded only because of the removing party's failure to obtain the consent of codefendants; the court decided nothing on Sphere Drake's arbitrability motion and in fact later declared the motion moot.[3] This civil action, filed before that order of remand, is not prohibited under *Majoue* and *Merrill Lynch*, because it does not constitute a collateral attack on the order of remand.

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[3] To the extent that the remanding judge considered arbitration issues in connection with the motion to remand (in discussing subject matter jurisdiction under the Convention), we note that Sphere Drake is not asking the court to reconsider its analysis. The district court's ruling in this case is consistent with its remarks in its remand order in the earlier case.

B. Jurisdiction under the Convention.

Marine Towing next argues that the district court lacked jurisdiction under the Convention[4] because Marine Towing and Sphere Drake had no "agreement in writing" to arbitrate.[5] The Convention provides that the phrase " 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."[6]

Marine Towing contends that, because it did not sign the insurance contract, the policy cannot provide the agreement in writing. Marine Towing would define an "agreement in writing" only as 1) a contract or other written agreement signed by the parties or 2) an exchange of correspondence between the parties demonstrating consent to arbitrate. We disagree with this interpretation of the Convention. We would outline the Convention definition of "agreement in writing" to include either

(1) an arbitral clause in a contract or

(2) an arbitration agreement,

(a) signed by the parties or

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[4] A proceeding "falling under the Convention shall be deemed to arise under the laws and treaties of the United States," and original jurisdiction is in the district courts. 9 U.S.C.A. § 203 (West Supp.1993).

[5] The Convention applies if there is "an agreement in writing" in which the parties undertake to submit their differences to arbitration. Convention, art. II § 1.

[6] *Id.* § 2.

(b) contained in an exchange of letters or telegrams.

The insurance contract indisputably contains an arbitral clause. Because what is at issue here is an arbitral clause in a contract, the qualifications applicable to arbitration agreements do not apply. A signature is therefore not required.[7] *But see Sen Mar, Inc. v. Tiger Petroleum Corp.* 774 F.Supp. 879, 882 (S.D.N.Y.1991) (requiring that arbitration clause be found in a signed writing or an exchange of letters to be enforceable). The district court properly did not require that the contract containing an arbitral provision be signed to constitute an agreement in writing under the Convention.

IV. Compelling Arbitration

The final question is whether the district court properly compelled the parties to arbitrate. Of the requirements for referring a dispute to arbitration under the Convention,[8] only one is at issue: whether there is an agreement in writing to arbitrate. This question having been answered in the affirmative in resolving Marine Towing's jurisdictional challenge, the district court properly compelled arbitration.

AFFIRMED.

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[7] Additionally, we do not reach the agency arguments pertaining to whether an exchange of correspondence occurred.

[8] *See Sedco, Inc. v. Petroleos Mexicano Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1144-45 (5th Cir. 1985).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3200

SPHERE DRAKE INSURANCE PLC,

Plaintiff-Appellee,

versus

MARINE TOWING, INC., ET AL.,

Defendant-Appellee.

Appeal from the United States District
Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 3/23/94), 5 Cir., ( ), ( ) F.3d ( )

(April 22, 1994)

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and STAGG*, District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members

of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ John M. Duhé, Jr.
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SPHERE DRAKE INS., PLC	§	CIVIL ACTION NO. 92-2058
-VERSUS-	§	SECTION: "B" (6)
MARINE TOWING, INC., ET AL.	§	

ORDER

(Filed Feb. 26, 1993)

This matter was heard on the court's docket on 20 January 1993, and after considering the briefs submitted by the parties and the oral arguments of counsel, it is hereby ordered:

1. Sphere Drake Insurance, plc's Motion for an Order Granting its Petition to Compel Marine Towing, Inc., St. Judge Marine Services, Inc., Mooser Towing Inc., Riverside Maritime Enterprises, Inc., Brass Marine Inc., and Charles Arnold (collectively referred to as "Marine Towing") to arbitrate all questions, issues and disputes concerning insurance coverage under Sphere Drake policy 91 SBAEP 00227, including the insurance coverage issues pertaining to the sinking of the M/V ST. JUDE on or about 14 March 1991, is hereby GRANTED;

2. Sphere Drake, plc's Motion for a Stay of all federal and state court litigation between Marine Towing and Sphere Drake, including but not limited to Civil Action No. 92-1508, Section "B" in the United States District

Court for the Eastern District of Louisiana, and Civil Action No. 431-646 in the 24th Judicial District Court, Parish of Jefferson, State of Louisiana, pending the outcome of the arbitration in London, England, is hereby GRANTED, reserving Marine Towing's right to proceed against any other party in the aforementioned federal and state litigation; and

3. Marine Towing's Motion for Summary Judgment is hereby DENIED.

New Orleans, Louisiana, this 25th day of February, 1993.

/s/ Frederick J.R. Heebe
UNITED STATES
DISTRICT JUDGE

Respectfully submitted,

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Riverside Maritime
Enterprises, Inc., Brass Marine, Inc.
and Charles Arnold

CERTIFICATE OF SERVICE

I HEREBY CERTIFY and I have on this 19th day of February 1993, served a copy of the foregoing pleading on counsel for all parties to this proceeding, either by telefax or by placing same in the United States Mail, properly addressed, and first class postage prepaid.

/s/ R. H. Murphy
Robert H. Murphy

APPENDIX D

MINUTE ENTRY
HEEBE, J.
DECEMBER 28, 1992

SPHERE DRAKE INSURANCE plc

VERSUS

MARINE TOWING, INC., ST. JUDE MARINE SERVICE, INC., MOOSE TOWING, INC., RIVERSIDE MARITIME ENTERPRISES, INC., BRASS MARINE, INC., AND CHARLES ARNOLD

CIVIL ACTION
NO. 92-2058
SECTION "B" (6)
(Filed Dec. 28, 1992)

This cause came on for hearing on a previous day on the motion of defendants, Charles Arnold, St. Judge Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises, Inc., Brass marine, Inc., and Marine Towing, Inc., to dismiss the petition for order to compel arbitration and for stay of litigation filed in this proceeding by plaintiff, Sphere Drake Insurance plc.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the motion of defendants, Charles Arnold, St. Judge Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises, Inc., Brass Marine, Inc., and Marine Towing, Inc., to dismiss the petition for order to compel arbitration and for stay of litigation, be, and the same is hereby DENIED.

REASONS

On April 7, 1992, Charles Arnold, St. Judge Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises, Inc., Brass Marine, Inc., and Marine Towing, Inc. (hereinafter "Marine Towing") commenced suit against Sphere Drake Insurance plc, among others, in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, to obtain a declaration that the policy of Protection and Indemnity Insurance (hereinafter "P & I policy") issued by Sphere Drake to Marine Towing provided coverage for the loss of the M/V ST. JUDE, and the death of four crewmen, in the Mississippi River on march 14, 19[illegible]. The parties requested coverage under Sphere Drake policy wording SD 350, Class 1, which specifically includes an arbitration clause. Marine Towing also sought to recover damages and statutory penalties for the refusal of Sphere Drake to honor its obligations under the policy.

On May 1, 1992, purportedly in compliance with The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (hereinafter "the Convention"), 21 U.S.T. 2517, T.I.A.S. No. 6997, codified as 9 U.S.C. §§ 201, *et seq.*, Sphere Drake unilaterally field a Notice of Removal of the state court action. The Notice of Removal did not join the other defendants to the state court proceeding, Schade & Company, Inc., Eric Schade, Alfred Schade, and the ABC Insurance Company. After removal, the case was docketed in this Court as Civil Action No. 92-1509, under the caption "Charles Arnold, St. Judge Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises, Inc., Brass Marine, Inc., and Marine Towing, Inc. v. Sphere Drake Insurance PLC, Schade & Company, Inc., Eric Schade, Alfred Schade, and ABC

Insurance Company" (hereinafter the "Removal Action"). Sphere Drake then filed a motion in the Removal Action to compel arbitration.

In part because Sphere Drake failed to join all state court defendants in its Notice of Removal, as required by 9 U.S.C. § 205 and 28 U.S.C. § 1441(a), Marine Towing moved to remand the Removal Action to state court on May 29, 1992. Defendants, Eric Schade, Alfred Schade, and Schade & Company, Inc., filed a motion to remand on June 1, 1992. In an order dated November 18, 1992, this Court granted both plaintiffs' and defendants' motions to remand. In an order dated November 19, 1992, this Court stated that Sphere Drake's motion to compel arbitration in Civil Action 92-1509 had been rendered moot by this Court's decision on the motions to remand.

On June 16, 1992, Sphere Drake filed a petition to compel arbitration and for stay of litigation and commenced this proceeding, Civil Action No. 92-2058. Sphere Drake's petition to compel arbitration seeks no additional relief beyond that sought in its motion to compel arbitration filed in Civil Action No. 92-1509. Sphere Drake seeks the enforcement of a purported agreement to arbitrate contained in pre-printed form provisions of its policy, provisions that Marine Towing contends were not brought to its attention until after the sinking of the M/V ST. JUDE. Defendants filed the motion at issue, to dismiss Sphere Drake's petition to compel arbitration and for stay of litigation, on the grounds that this Court lacks subject matter jurisdiction and that the petition fails to state a cause of action.

In filing the petition to compel arbitration and to stay litigation in this Court, Sphere Drake contended that the enabling legislation in 9 U.S.C. § 201 *et seq.*, provides this Court with subject matter jurisdiction, pursuant to 28 U.S.C. § 1331. There are two relevant provisions which determine whether this Court in fact has subject matter jurisdiction. First, 9 U.S.C. § 203 provides: "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." Applying 28 U.S.C. § 1331, of an action falls under the Convention, the Federal courts have subject matter jurisdiction. Another provision, 9 U.S.C. § 202, aids in determining whether an action falls under the Convention: "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention."

Sphere Drake cites Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co. (Pemex), 767 F.2d 1140, 1144-45 (5th Cir. 1985), for the rule that a district court has subject matter jurisdiction in a case under the Convention where: (1) there is an agreement in writing to arbitrate the dispute; (2) the agreement provides for arbitration in the territory of a Convention signatory; (3) the agreement arises out of a commercial legal relationship; and (4) a party to the agreement is not an American citizen. Sphere Drake accurately points out that the first factor is the only factor in dispute. This Court must therefore determine whether there is an agreement in writing to arbitrate the dispute; if there is, then under 9 U.S.C. §§ 201, *et seq.*, and

Sedco, Inc., the Convention applies and this Court has subject matter jurisdiction.

Article II(2) provides the only clarification as to what qualifies as an "agreement in writing":

> The term "agreement in writing" *shall include* an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telexes. (emphasis added)

Thus, under Article II(2) of the Convention, this Court finds that there is an agreement in writing if there is either (1) an arbitral clause in a contract; or (2) an arbitration agreement signed by the parties; or (3) an arbitration agreement contained in an exchange of letters or telexes.

Both parties admit that the insurance policy at issue, SD 350, Class 1, incorporates an arbitration provision, Clauses 51-52, p. A-11; they disagree as to its enforceability. Defendants contend that the arbitration provision does not constitute an agreement in writing, or, in the alternative, is not valid, so that the Convention does not apply and this Court does not have subject matter jurisdiction. Defendants contend that the insurance policy, which contains the arbitration provision, is certainly not a writing signed by the parties. Defendants also argue that there are no letters or telegrams concerning the arbitration provision. Therefore, defendants claim, there is no "agreemetn in writing" between the parties. Defendants do not acknowledge that a valid arbitral clause in a contract is enough to satisfy the requirement that there be an agreement in writing.

Sphere Drake agrees that the arbitration provision must be in writing, but emphasizes that the writing need not be signed by the parties. Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987). In opposition to Marine Towing's argument that there was no exchange of letters or telexes evidencing an arbitration agreement, Sphere Drake argues that there was an exchange of correspondence between Sphere Drake and Marine Towing which constitutes an agreement in writing. Sphere Drake submits that Marine Towing's broker made a written offer (the "slip"). That slip requested coverage under the Sphere Drake policy wording SD 350, Class 1, which contains an arbitration agreement. Sphere Drake contends that its representative accepted the offer by stamping with Sphere Drake's seal, initialing, marking the slip as "bound," and delivering the signed policy to Marine Towing's broker.

Commenting on the enforceability of any arbitration provision, the Fifth Circuit stated: "Absent allegations of fraud in the inducement of the arbitration clause itself, arbitration must proceed when an arbitration clause on its face appears broad enough to encompass the party's claims." *Sedco*, 767 F.2d at 1148 (citations omitted). While defendants allege that they were unaware of the arbitration clause at the time they obtained the insurance policy, defendants do not allege that they were fraudulently induced into obtaining insurance coverage from Sphere Drake. In addition, defendants do not allege that the arbitration clause is not broad enough to mandate arbitration in the situation at hand. Rather, defendants argue

simply that they are not bound by the arbitration provision because they did not know that it was in the insurance policy until the dispute at hand arose.

Accordingly, this Court finds that the arbitration provision in clauses 51-52 of the insurance policy is valid and constitutes an agreement in writing between the parties. Consequently, the Convention is applicable and this Court has subject matter jurisdiction.

This Court need not delve into the question of whether there was an agreement in writing as set forth in (2) or (3) above. However, since the parties argued at length about whether there was an agreement in writing under (2) or (3), this Court will address those arguments.

In *Genesco,* the Second Circuit said that while the contract containing the arbitration provision must be in writing, it need not be signed by the parties. *Id.* at 846. The Second Circuit relied upon 9 U.S.C. § 3 for that proposition, which simply requires an "agreement in writing," but does not explain that term any further. The Tenth Circuit is in accord with the Second Circuit on this issue; the Tenth Circuit held that the arbitration provision must be in writing, but that it need not be a simply integrated writing and it need not be signed by the parties. Medical Development Corp. v. Industrial Molding Corp., 479 F.2d 345, 348 (10th Cir. 1973).

Genesco follows a line of cases in the second circuit in which the appellate court has held that a signature is not required. *E.g.*, McAllister Bros., Inc. v. A & S Transp. Co., 621 F.2d 519, 524 (2d Cir. 1980); Fisser v. International Bank, 282 F.2d 231, 233 (2d Cir. 1960). In addition, the district courts in the second circuit have followed the

appellate court's holdings on this issue. *See, e.g.*, Creative Secur. Corp. v. Bear Stearns & Co., 671 F.Supp. 961, 963 n.2 (S.D.N.Y. 1987), *aff'd*, 847 F.2d 834 (2d Cir. 1988); Ocean Industries, Inc. v. Soros Associates International, Inc., 328 F.Supp. 944, 947 (S.D.N.Y. 1971).

This Court was not directed to any cases, nor did it locate any on its own, in which a court held that a signature is required in order for an arbitration provision to be binding. The Fifth Circuit has not addressed the issue of whether a signature is required in order for an arbitration provision to be binding. While this Court is not bound by the Second and Eighth Circuits' decisions on this issue, their holdings do provide persuasive authority. In the absence of contrary authority, this Court finds that the arbitration agreement need not be signed; however, the arbitration agreement must be contained in a writing.

The issue, then, is whether the marked slip constitutes a written agreement. In *Medical Development Corp.*, the Tenth Circuit said that the arbitration clause must be in writing, although it need not be signed by the parties. 479 F.2d at 348. The writing in that case consisted of two purchase orders by the plaintiff and a written confirmation from the defendant. *Id.* at 347-48. At the bottom of the front page of the confirmation sheet was a statement that the parties are bound by the terms and conditions on the back of the sheet. There was an arbitration clause on the reverse side of the sheet. The parties did not sign the confirmation sheet. The Tenth Circuit reversed the district court's grant of a permanent injunction against arbitration, finding that the district court's findings were not sufficiently detailed to permit an intelligent review. *Id.* at

349. The appellate court emphasized that the district court had ruled that an earlier exchange of documents exactly like the ones at issue had been found arbitrable and that the district court's rulings were therefore inconsistent. *Id.* at 348-49.

This Court finds that the slips submitted by Marine Towing's broker and marked by Sphere Drake satisfy the writing requirement. Thus, this Court agrees with Sphere Drake that the arbitration provision in the insurance policy is an arbitration agreement contained in an exchange of letters and telexes and therefore qualifies as an agreement in writing. This finding provides a second ground for this Court's earlier ruling that the Convention is applicable and this Court has subject matter jurisdiction.

Defendants' second basis for its motion to dismiss is that Sphere Drake does not have a cause of action because there is no arbitration agreement on which to base its claim. The Court necessarily addressed and disposed of that argument above, in determining that this Court has subject matter jurisdiction in this case. As stated above, the Court finds that the arbitration provision in the insurance policy constitutes an agreement in writing which is enforceable under the Convention. Therefore, Sphere Drake's petition for order to compel arbitration and for stay of litigation states a cause of action.

Accordingly,

IT IS THE ORDER OF THE COURT that the motion of defendants, Charles Arnold, St. Jude Marine Service, Inc., Moose Towing, Inc., Riverside Maritime Enterprises,

Inc., Brass Marine, Inc., and Marine Towing, Inc., to dismiss the petition for order to compel arbitration and for stay of litigation, be, and the same is hereby DENIED.

/s/ Frederick J.R. Heebe
UNITED STATES
DISTRICT JUDGE